

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

RICHARD KIRBY,

Plaintiff,

v.

No. CIV 08-659 JCH/LFG

ROBERT EZELL, et al.,

Defendants.

**ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS
AND RECOMMENDED DISPOSITION**

THIS MATTER is before the Court on the Magistrate Judge's Findings and Recommended Disposition ("R&R"), filed March 25, 2009 (Doc. No. 37), recommending that the motion to dismiss filed by Defendants Robert Ezell and David Brown (Doc. No. 25) be granted and part and denied in part, with the result that Plaintiff Richard Kirby's ("Kirby") claim of retaliation against Defendant Brown be denied and dismissed, without prejudice, for failure to exhaust administrative remedies and that Defendant Brown be dismissed from this lawsuit. The R&R also recommends that Defendant Shannon McReynolds' motion to dismiss or for summary judgment (Doc. No 26) be denied because of the existence of genuine issues of material fact with respect to whether Kirby exhausted a denial of access claim asserted against Defendant Ezell and because there was no showing of exhaustion as to the other denial of access claims, with the result that the denial of access claims proceed.

On April 17, 2009, Kirby filed “Objections and Suggestions (Doc. 40) to the R&R. The Court now conducts its *de novo* review of the Magistrate Judge’s R&R to which Kirby objects. 28 U.S.C. § 636(b)(1).

Kirby’s “objections and suggestions” do not constitute objections to the Magistrate Judge’s R&R. Instead, he seeks to add language to his original complaint and potentially add new claims or requests for relief. This is not allowed. “In this circuit, theories raised for the first time in objections to the magistrate judge’s report are deemed waived.” United States v. Garfinkle, 261 F.3d 1030, 1031 (10th Cir. 2001). *See also* Marshall v. Chater, 75 F.3d 1421, 1426-27 (10th Cir. 1996) (It is inappropriate to raise new issues for the first time in objections to a magistrate judge’s recommended disposition).

On page 3 of his “objections and suggestions,” Kirby purportedly sets out objections. However, the Court interprets the objections to be an attempt to re-argue the same positions the Magistrate Judge already considered and rejected, in part. Thus, to the extent that Kirby sets forth any objections to the R&R, they are overruled.

In sum, the Court agrees with the Magistrate Judge’s R&R, recommending that Kirby’s retaliation claim against Defendant Brown be dismissed, without prejudice, and that Defendant Brown be dismissed from this lawsuit; and that Defendant McReynolds’ motion to dismiss or for summary judgment be denied for the reasons set forth in the R&R. The result is that Kirby’s denial of access claims proceed against Defendants Ezell, McReynolds and Major Horton, and the Magistrate Judge will enter an Order directing submission of a Martinez report in relation to these remaining claims.

IT IS HEREBY ORDERED that the findings and recommended disposition of the United States Magistrate Judge are adopted by the Court, and

IT IS FURTHER ORDERED that Kirby's retaliation claim against Defendant Brown be dismissed, without prejudice, for failure to exhaust administrative remedies and that Defendant Brown is dismissed from this lawsuit.


UNITED STATES DISTRICT COURT